



22 October 2020

Via email

David Tischer
U.S. Fish and Wildlife Service
5275 Leesburg Pike
MS: IRTM
Falls Church, VA 22041
FOIA@doioig.gov

RE: Freedom of Information Act Request: Border Wall Construction Impacts on the San Bernardino National Wildlife Refuge

Dear Mr. Tischer:

On behalf of the Sierra Club, I hereby request information under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Department of Interior (“DOI”) regulations at 43 C.F.R. § 2.1, *et seq.*

REQUESTED RECORDS¹

Sierra Club requests Records of the following type in the possession, custody, or control of the U.S. Fish and Wildlife Service (“FWS” or “Service”), Interior Region 8, for the time period starting from **January 1, 2020 up through and including the date that you conduct your search for documents**:

1. Plans or actions undertaken within the San Bernardino National Wildlife Refuge to relocate, preserve, or salvage endangered fish species;
2. Observed instances of environmental harm occurring within or directly adjacent to the San Bernardino National Wildlife Refuge as a result of border barrier and/or wall

¹ “Records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise.

construction, including, but not limited to, fish kills, habitat destruction, loss of wildlife, and discharges of visibly dirty or otherwise contaminated water;

3. Water quantity and/or quality monitoring in ponds and wells located on the San Bernardino National Wildlife Refuge.
4. Communications between FWS employees, independent contractors, and/or representatives and U.S. Customs and Border Protection, the U.S. Army Corps of Engineers, and/or contractors (including, but not limited to, Southwest Valley Constructors, Kiewit, Logistics Management Institute, and Baker Engineering) employees, independent contracts, and/or representations regarding potential or observed impacts of border walls and roads on San Bernardino National Wildlife Refuge and adjacent lands
5. Communications between FWS employees, independent contractors, and/or representatives and U.S. Customs and Border Protection, the U.S. Army Corps of Engineers, and/or contractors (including, but not limited to, Southwest Valley Constructors, Kiewit, Logistics Management Institute, and Baker Engineering) employees, independent contracts, and/or representations regarding any border wall design elements and/or mitigation to lessen adverse impacts on local wildlife.

DUTY TO PRESERVE RECORDS

FWS must preserve all the records requested herein while this FOIA is pending or under appeal. 43 C.F.R. § 2.51; *see also Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”). Accordingly, please immediately advise custodians of potentially responsive records that the above records have been requested under FOIA and therefore may not be destroyed.

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. Courts have held federal agencies in contempt for “contumacious conduct” and ordered them to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.” *Landmark Legal Found. v. DOI*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and deliver the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in the format requested if the record is readily reproducible by the agency in that format. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B). We request that you provide electronic documents individually, and not as batched files. Specifically, for any document stored as Electronically Stored Information (ESI), we request that the document be produced in the native file type. This includes e-mail (whether sent, received or drafted), word-processing files, tables, charts, graphs and database files, electronic calendars, proprietary software files, and spreadsheets. ESI can also be provided in the form of a load file that includes a common file type (TIFF, HTML, PDF) while maintaining access to the native file and its source data, including the ability to keyword search documents.

RECORD DELIVERY

We appreciate a prompt determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in Sierra Club filing an action before the relevant U.S. District Court to ensure timely receipt of the requested materials. You may email or mail copies of the requested records to:

Rose Monahan
Associate Attorney
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, California 94612
rose.monahan@sierraclub.org

Please send documents on a rolling basis. FWS search for—or deliberations concerning—certain records should not delay the production of others that FWS has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.12 (describing response deadlines).

FEE WAIVER REQUEST

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. §§ 2.45(a), 2.48. Sierra Club is the nation’s oldest grassroots organization with more than 3 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.²

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and non-profit public interest groups.”).

As explained below, this FOIA request satisfies the factors listed in DOI’s governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 43 C.F.R. § 2.45.

1. The subject matter of the requested records specifically concerns identifiable “operations and activities of the government.”

The requested records related to the operations of the San Bernardino National Wildlife Refuge and how those operations may be impacted by ongoing construction of a border wall along the U.S. – Mexican border. By their very definition, the documents concern “identifiable

² For recent examples, *see* FOIA Request Reference No. DOI-HQ-2017-2172 (fee letter waiver received Jan. 9, 2017); FOIA Request Reference No. DOI-HQ-2017-008402 (fee letter waiver received June 26, 2007); FOIA Request Reference No. DOI-HQ-2017-008571 & DOI-HQ-2017- 008581 (fee letter waiver received June 27, 2017); FOIA Request Reference No. DOI-HQ-2017- 008568 (fee letter waiver received June 28, 2017).

operations or activities of the government.”

2. The disclosure of the requested documents would be meaningfully informative and “likely to contribute to an understanding of Federal government operations or activities.”

Disclosure of the requested records will allow Sierra Club to convey information to the public about ongoing construction of the Trump administration’s border wall near the San Bernardino National Wildlife Refuge, which will reflect the Service’s actions, objections, and priorities, and specifically the current status of environmental degradation occurring on the Refuge as a result of construction activities.

Once the requested documents are made available, Sierra Club will analyze them and present its findings to its members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of how the Service has been acting and operating. The documents requested will thus be “meaningfully informative” and “likely to contribute” to an understanding of FWS’s operations and activities.

The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request. Thus, the requested documents are likely to meaningfully contribute to public understanding of governmental operations.

3. The disclosure would contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.

Sierra Club has long-standing experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, the Clean Air Act, Clean Water Act, climate policy, the protection of the natural environment, and the development and use of energy resources.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and over 30 million page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

In the past, Sierra Club has published, posted, or disseminated numerous stories health, the environment and alternative energy.³

³ For example, Sierra Club recently publicized results of its FOIA requests regarding outside influence on foreign travel at EPA, a story that was picked by the New York Times. Lisa Friedman, Eric Lipton and Kenneth P. Vogel, *Ex-Lobbyist for Foreign Governments Helped Plan Pruitt Trip to Australia*, The New

Sierra Club intends to share the information received from this FOIA request with the public at large, our members, the media and our allies who share a common interest in the operations of FWS.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure would contribute “significantly” to public understanding of government operations or activities.

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations, and activities. For instance, disclosure will meaningfully enhance the public’s understanding of how border wall construction is impacting public land and harming threatened and endangered species. Additionally, the records will demonstrate what actions, if any, the Service is taking to fulfill the purposes of the San Bernardino National Wildlife Refuge, in light of these impacts. Accordingly, disclosure of the requested records will significant contribute to public understanding of government operations or activities.

5. The requester has no commercial interest that would be furthered by the requested disclosure.⁴

Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

Sierra Club respectfully requests that DOI waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation

York Times, <https://www.nytimes.com/2018/05/02/climate/DOI-pruitt-australia-travel.html>. Sierra Club also recently publicized the results of its FOIA requests regarding agency job freezes, a story that was picked up by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>; Lena H. Sun, *Nearly 700 vacancies at CDC because of Trump administration’s hiring freeze*, The Washington Post, https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.6c2e70d8581e.

⁴ Because Sierra Club has no commercial interest, it is not necessary to consider the final factor for a fee waiver, which compares the magnitude of an identified commercial interest to the public interest in disclosure.

for the denial. In the event that fees are ultimately assessed, please do not incur expenses beyond \$250 without first contacting our office for explicit authorization.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 415-977-5704 or by email at rose.monahan@sierraclub.org

Sincerely,



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